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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

BERNARDO DUARTE,

Defendant and Appellant.

B266312

(Los Angeles County
Super. Ct. No. KA102116)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Robert M. Martinez, Judge. Affirmed as modified.

Kevin Smith, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Yun K.
Lee, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Bernardo Duarte not guilty of second degree robbery (count 1; Pen. Code, § 211),¹ but convicted him of the lesser included offense of misdemeanor theft by larceny (§ 484, subd. (a)). Further, the jury convicted Duarte of making criminal threats (count 2; § 422, subd. (a)) and assault with a semiautomatic firearm (count 3; § 245, subd. (b)), with true findings as to both counts that Duarte personally used a firearm in the commission of the offense (§ 12022.5, subd. (a)). Finally, the jury found Duarte not guilty of kidnapping (count 4; § 207, subd. (a)), but convicted him of the lesser included offense of false imprisonment by violence or menace (§ 237, subd. (a)), with a finding that Duarte personally used a firearm in the commission of the offense (§ 12022.5, subd. (a)). The trial court sentenced Duarte to an aggregate term of nine years in state prison. We order a minor sentence modification and affirm the judgment.

FACTS

The Crimes

On May 19, 2013, Marcos Andrade (the victim as to all counts) went to a bar in West Covina named Around the Corner with friends. Andrade met a woman named Jo. Andrade did not know at first that Jo was married to Duarte. During the time he spent at the bar, Andrade also talked with Sergio Morales, who was working behind the bar, and as well as another Hispanic male.

When the bar closed early on the morning of May 20, Andrade, Jo, Morales and Duarte went outside. As Andrade and Jo went to Jo's car, Duarte went to his own car and took a semiautomatic handgun out of the trunk, and stated that he was going to "shoot in the air." Morales told Duarte to put the gun away. When Andrade "jokingly" put his hand out the window of Jo's car and told Duarte to "aim it right here," Duarte replied, "Don't tempt me 'cause I will." At that point, Andrade asked Jo to take him home, but Jo told him not to worry. The group then went to a strip club in La Puente.

¹ All further undesignated section references are to the Penal Code.

Upon exiting the strip club, Andrade and another male, James, got into Duarte's car. Andrade believed Duarte was going to drive him to his home in Hacienda Heights, but Duarte did not follow Andrade's directions. Instead, Duarte started speeding through residential areas and red lights. When Andrade asked Duarte why he was not following his directions, Duarte said that he had been drinking, and was trying to avoid the police station. During the ride, Andrade texted his ex-girlfriend that he was in trouble and felt he could only use "yes" and "no" answers when she called to find out what was happening.

After about 15 minutes, Duarte stopped his car at Del Valle Avenue and Hill Street in La Puente, and said that it was Andrade's "final stop." Duarte appeared "[v]ery aggressive" and "angry," and Andrade was "scared for his life." Duarte and James exited the car. Duarte pointed the gun at Andrade and pulled him out of the vehicle by his shirt and arm. Duarte pointed the gun at Andrade, told him to empty his pockets, and took off his shirt. Andrade told Duarte that he was "making a mistake," but he followed Duarte's orders and took out his keys, wallet, and cell phone and put them on the ground. Still pointing his gun, Duarte ordered Andrade to get on his knees and "face the other way." Believing that Duarte was going to shoot him, Andrade started to walk backwards down a hill in the direction of the nearest house, trying to keep James between them as a "shield." Duarte repeatedly told James to "move out of the way" because he (Duarte) was "going to shoot" Andrade. When the house lights came on, Andrade ran down the hill on Del Valle.

Jorge Veneros was delivering newspapers in the area when Andrade ran up to his truck asking for help because "they wanted to kill him." Andrade was not wearing a shirt and appeared frightened. Andrade got into Veneros's truck and said, "Let's go. They have a gun." Veneros sped away, and took Andrade to the sheriff's station nearby.

During the course of the police investigation, Andrade identified Duarte from a photograph line-up as the person who assaulted him.

Officer Sean Cariaga investigated the crimes and interviewed Duarte twice. When questioned about the events on May 19-20, Duarte became apprehensive and nervous. Duarte stated that he wanted Andrade to get out of the car, and that he was upset about the way people were behaving with his wife. He admitted that he and his friend got out of the car, but denied that he had a gun and said he never pointed a gun at Andrade. Duarte said that he and his friend tried to get Andrade back in the car by pulling on his shirt, and in the process Andrade's wallet, keys, and cell phone fell on the ground. When asked why he was attempting to get Andrade back in the car after removing him, Duarte said that he was "just being drunk and stupid." When Officer Cariaga told Duarte that witnesses saw him with a gun, he admitted he had one, but claimed it was not loaded. Duarte told Officer Cariaga that Andrade's property was in Duarte's sister's vehicle and that the gun was in his living room closet.

On May 22, 2013, Officer Cariaga went to Duarte's home where he found a gun with a loaded magazine next to it, but did not find Andrade's property in Duarte's sister's car. When Officer Cariaga told Duarte that he did not find the property, Duarte had his sister deliver the items to the station. She claimed that the items were between the seat and the console. Eventually, Duarte wrote a letter apologizing to Andrade at Officer Cariaga's suggestion. Duarte's letter stated that he "never intended to keep" Andrade's belongings, and did not intend to "do [him] any harm," and that everything that happened was because he had been "a drunk and jealous husband."

The Criminal Case

The People filed an information charging Duarte with second degree robbery (count 1; § 211), making criminal threats (count 2; § 422, subd. (a)), assault with a semi-automatic firearm (count 3; § 245, subd. (b)), and kidnapping (count 4; § 207, subd. (a)).²

² The information initially included a count 5, charging false imprisonment by violence (§ 236). That count was dismissed before trial pursuant to section 1385. At trial, the jury was instructed on false imprisonment by violence as a lesser included offense of the kidnapping charge alleged in count 4.

Further, the information alleged as to all counts that Duarte had personally used a firearm in the commission of the offenses (§ 12022.5, subd. (a)).

In Spring 2015, the charges were tried to jury, and the prosecution presented evidence establishing the facts summarized above. Duarte testified in his own defense. He explained that he occasionally worked at the Around the Corner bar in West Covina and kept a gun with him at work because there had been attempts to break into the bar. The gun was not loaded. He had taken it in his car when the group went to the strip club. Andrade denied that he had pointed the gun in the air on the night in question, and denied that he ever pointed the gun at Andrade. He testified that he never intended to rob or kidnap Andrade. Further, it had been disclosed that Duarte had failed to return for an afternoon session at his preliminary hearing while he was released on bond. Here, Duarte explained that he did not return because he was scared and believed he was going to jail because he did not have money to continue the bond. Duarte was taken into custody a year later.

The jury returned verdicts finding Duarte not guilty of robbery (count 1; § 211), but guilty of the lesser included offense of misdemeanor theft by larceny (count 1; § 484, subd. (a)), guilty of making criminal threats (count 2; § 422, subd. (a)) with a finding that he personally used a firearm (§ 12022.5, subd. (a)); guilty of assault with a semi-automatic firearm (count 3; § 245, subd. (b)) with a finding that he personally used a firearm (§ 12022.5, subd. (a)); not guilty of kidnapping (count 4), but guilty of the lesser included offense of false imprisonment by violence or menace (§ 237, subd. (a)) with a finding that he personally used a firearm (§ 12022.5, subd. (a)).

The trial court sentenced Duarte to an aggregate term of nine years in state prison consisting of a midterm of six years on count 3 (assault with a semi-automatic firearm) plus three years for the firearm allegation. The court ordered the sentences on the remaining counts (six months in jail for count 1, and five years in prison for each of counts 2 and 4) to run concurrent to the term on count 3.

Duarte filed a timely notice of appeal.

DISCUSSION

I. Substantial Evidence Supports the Assault Verdict

Duarte contends the evidence is insufficient to support the jury's verdict in count 3 for assault with a semi-automatic firearm (§ 245, subd. (b)). We disagree.

When presented with a claim on appeal that the evidence is insufficient to support a jury's verdict, a reviewing court examines the entire record in the light most favorable to the verdict and determines whether the record discloses evidence that is reasonable, credible, and of solid value such that a reasonable jury could find the defendant guilty beyond a reasonable doubt. (*People v. Smith* (2014) 60 Cal.4th 603, 617.) In making this examination, a reviewing court “must presume in support of the [verdict] the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]” (*People v. White* (2014) 230 Cal.App.4th 305, 315, fn. 13.)

Section 240 defines the offense of assault to be “an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” Section 245, subdivision (b), requires the additional element that the assault be committed by use of a semi-automatic firearm.

Duarte argues that “pointing an unloaded gun at another person with no effort or threat to use it as a bludgeon, is not an assault with a deadly weapon.” (*People v. Orr* (1974) 43 Cal.App.3d 666, 672; and see also, e.g., *People v. Chance* (2008) 44 Cal.4th 1164, 1172, fn. 7 [an assault with a deadly weapon “cannot be committed with an unloaded gun, unless the weapon is used as a bludgeon”].) Duarte recognizes that the evidence at this trial showed that he aimed a semiautomatic gun at Andrade, but he argues: “There was no evidence that the gun was loaded . . . ; indeed the only evidence was that the gun was *unloaded*.” (Italics in original.)

We reject Duarte's argument because "[t]he question of whether or not the gun was loaded is a question for the jury, and the prosecution can establish it by circumstantial evidence. [Citation.]" (*People v. Orr, supra*, 43 Cal.App.3d at p. 672.) As the Supreme Court has explained: "California courts have often held that a defendant's statements and behavior while making an armed threat against a victim may warrant a jury's finding the weapon was loaded." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 12.)

Here, there was substantial evidence from which the jury could reasonably infer that the gun used by Duarte was loaded. First and foremost, Duarte aimed the gun at Andrade while ordering him to take off his shirt and empty his pockets. This tends to show that the gun was loaded. Beyond this, when the group was in the parking lot at the bar before heading to the strip club, Duarte took his gun from the trunk of his car and said he was going to shoot it in the air. He did not do so when someone told him to put the gun away. Further, when Andrade jokingly told Duarte to aim at his hand, Duarte replied, "Don't tempt me 'cause I will." These facts also tend to show the gun was loaded. Further, during the events after Duarte stopped his car, when Andrade was using Duarte's companion, James, as a "shield," Duarte told James to move out of the way, so that Duarte could shoot. Duarte's statements and behavior, taken all together, "would be meaningless unless the weapon were loaded." (*People v. Rodriguez, supra*, 20 Cal.4th at p. 13.) Finally, when the gun was recovered, it was next to a loaded magazine. This evidence alone would support the jury's reasonable inference that Duarte used a loaded gun. The jury was not required to believe Duarte's self-serving statements to Officer Cariaga and at trial that the gun was not loaded.

II. Substantial Evidence Supports the Larceny Verdict

Duarte next contends the evidence is insufficient to support the conviction for theft by larceny. Specifically, Duarte argues the evidence does not show that he intended to permanently deprive Andrade of his property at the time he took possession of it. He claims the evidence shows only that he picked up Andrade's property after he left it behind during his escape, and that he arranged for the property to be returned to police

within a few days. Viewing the evidence in the light most favorable to the jury's verdict as we must (see section I, *ante*), we find the evidence supports the jury's verdict.

The elements of theft by larceny are: (1) taking possession of personal property owned by someone else; (2) without the owner's consent; (3) with the intent to deprive the owner of it permanently; and (4) asportation of the property, even a small distance, and retention of the property for any period of time, however brief. (*People v. Catley* (2007) 148 Cal.App.4th 500, 505.) Duarte's argument on appeal implicates only the third element stated above. We find his argument unpersuasive.

The intent to deprive the owner of property permanently does not necessarily mean that the defendant intended to keep the property permanently. As the Supreme Court has explained: "[T]he intent to steal is satisfied when 'the defendant takes property with intent to use it temporarily and then to *abandon* it in circumstances making it unlikely the owner will recover it.'" (*People v. Avery* (2002) 27 Cal.4th 49, 57.) In short, it is the intent to deprive the owner permanently of his or her property that makes the taking a theft. (*Ibid.*) At the same time, a theft by larceny is not committed when the defendant takes the owner's property while harboring the intent to return the property "within a reasonable time." (*Id.* at p. 56.) Of course, a defendant's intent is rarely susceptible of direct proof. For this reason, the law allows a jury to infer intent from the circumstances surrounding a charged offense. (See, e.g., *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1245.) Thus, where the facts and circumstances of a case, including the conduct of the defendant, reasonably indicate his or her intent, the conviction may not be disturbed on appeal. (*Ibid.*)

Here, the evidence shows that Duarte used a firearm and ordered Andrade to empty his pockets, and that Andrade complied. Duarte picked up the items after Andrade ran from the scene. After Andrade fled, Duarte took Andrade's property home, and then put the property in a car belonging to Duarte's sister, further insulating it from its ultimate recovery. Duarte claims he did not intend to permanently deprive Andrade of his property because he "asked [his sister] to return the items to police two days after the incident." But Duarte omits the fact that this occurred only after he was taken into

custody and was being questioned by Officer Cariaga. We are satisfied that the jury reasonably found that at the time Duarte took Andrade's property, Duarte had the intent to deprive Andrade of the property permanently. The fact that he later changed his mind did not undo his criminal intent at the time of the taking.

III. The Section 654 Sentencing Issue

Lastly, Duarte claims the trial court erred in ordering the terms on count 2 (criminal threats) and count 4 (false imprisonment) to run concurrent to the term imposed on count 3 (assault with a semiautomatic firearm). The People concede the error. We agree.

At sentencing, the trial court expressly ruled that section 654 applied to the offenses in counts 2 (criminal threats), 3 (assault with a semiautomatic firearm), and 4 (false imprisonment). As stated by the court: "The three felonies described a single course of conduct. The court doesn't find any independent motivation on any of them." The court selected count 3 as the base term, and imposed the middle term of six years, plus three years term for the firearm enhancement, for an aggregate term of nine years. As to count 2, the court sentenced Duarte to the middle term of two years, plus three years for the firearm enhancement, to run concurrent to the sentence on count 3. On count 4, the court sentenced Duarte to the middle term of two years, plus three years for the firearm enhancement, to run concurrent to the sentences on counts 3 and 2.

Section 654 precludes multiple punishments for a single act or omission, even though that act or omission violates more than one statute and thus constitutes more than one crime. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.) Where section 654 applies, imposition of concurrent sentences is precluded. (*People v. Jones* (2012) 54 Cal.4th 350, 353.) "Instead, the accepted 'procedure is to sentence defendant for each count and stay execution of sentence on certain of the convictions to which section 654 is applicable.' [Citations.]" (*Ibid.*)

Here, having found the facts supported application of section 654, the trial court should not have imposed concurrent terms on counts 2 and 4. Thus, we direct that the judgment be modified to reflect that the terms imposed on counts 2 and 4 are imposed and stayed pursuant to section 654, rather than to run concurrent.

DISPOSITION

The judgment is modified to reflect that the terms imposed on counts 2 and 4 are imposed and stayed pursuant to section 654. As modified, the judgment is affirmed. The trial court shall prepare a new abstract of judgment accordingly.

BIGELOW, P.J.

We concur:

RUBIN, J.

GRIMES, J.